MH PROJECTS SDN BHD

v.

TEAM VANTAGE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-786-2002]
9 APRIL 2003

COMPANY LAW: *Winding-up - Injunction to restrain petition - Serious issues to be tried, whether any - Whether defendant's debt substantially disputable - Whether threat of winding-up used as means of seeking payment of disputed debt - Whether defendant's s. 218 notice issued mala fide - Whether defendant should have resorted to arbitration - Balance of convenience*

CIVIL PROCEDURE: *Injunction - Interim injunction - To restrain winding-up petition - Serious issues to be tried, whether any - Whether defendant's debt substantially disputable - Whether threat of winding-up used as means of seeking payment of disputed debt - Whether defendant's s. 218 notice issued mala fide - Whether defendant should have resorted to arbitration - Balance of convenience*

Having secured a contract from the public works department ('JKR') for the construction of a hospital, the plaintiff (main-contractor) awarded the computerisation component (worth RM67.5 million) of the said contract to the defendant (sub-contractor). For the ongoing work, the plaintiff paid the defendant RM3,518,600 based on two interim claims. Subsequently, JKR terminated the computerisation component of the contract and requested the plaintiff to submit documentary proof of the actual work done in respect thereof for the purposes of verification and payment. Accordingly, the plaintiff informed the defendant of this but the latter did not comply and, instead, sent two notices demanding payment for the sum of RM17,612,741.56 for work allegedly done. As a result, the plaintiff was unable to submit documentary proof of its claims to JKR for payment. Subsequently, the defendant issued a notice under s. 218 of the Companies Act 1965 against the plaintiff for an alleged debt totalling RM5,465,442.46. The plaintiff then filed the instant application (inter partes) for an interim injunction to prevent the defendant from presenting a winding-up petition against it until the disposal of the suit between the parties.

Held:

[1] In an application for an interim injunction pending the trial of an action, the court is not called upon to resolve bona fide conflict of evidence or decide upon difficult questions of law based entirely on affidavit evidence without the benefit of detailed arguments and mature considerations. As a winding-up order against a limited company will normally inflict upon it irreparable damage, besides the consideration of balance of convenience, what the court is required to do at this stage is to decide, based on the affidavit evidence available, whether there are any serious issues to be tried; and whether the defendant, in its intended winding-up petition has sought, in effect, to convert a statutory court into common law trial court. (p 115 f-h)

[2] Despite repeated requests from the plaintiff, the defendant had failed to substantiate the 'value of work properly executed' as per cl. 9 of the sub-contract. Furthermore, under the terms of the sub-contract, the defendant's claims were subject to the plaintiff's contractual rights of set-off and abatement. Consequently, the sums claimed by the defendant could not constitute a debt that was due and payable by the plaintiff or one that could not be substantially disputed. (p 116 a-f)

[3] The underlying tenor and substance of the defendant's claim was an allegation of breach of contract, which merely gave rise to a right of action. By resorting to issuing the s. 218 notice, the defendant seemed to be using the court process to pressure the plaintiff, a solvent, viable and an on-going concern, into paying a disputed debt. The facts also supported the plaintiff's allegation that the defendant was acting mala fide because, despite having a provision in the sub-contract for referring any disputes to arbitration, the defendant chose to resort to the threat of a winding-up as a means of seeking payment from the plaintiff. Hence, the balance of convenience clearly dictated that an interim injunction should be granted to prevent the defendant from presenting a winding-up petition against the plaintiff. (p 117 d-f)

[Interim injunction granted.]

Case(s) referred to:
Acsim (Southern) v. Danish Contracting 47 BLR 55 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor [1995] 1 CLJ 293 CA ***(refd)***
RHB Bank Bhd v. Gunasingam Ramasingam [2002] 5 CLJ 544 HC ***(refd)***
Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 ***(refd)***

For the applicant/plaintiff - JT Chong; M/s JT Chong Assoc
For the respondent/defendant - Wong Rhen Yen (Rajvinder Singh); M/s Syed, Paul & Co

Reported by Gan Peng Chiang

JUDGMENT

Vincent Ng J:

Preamble

On 24 February 2003, I allowed the plaintiff's *inter partes* application (encl. 4) for an interlocutory injunction to prevent the defendant from presenting a winding-up petition against the plaintiff until the disposal of this civil suit.

Common Ground

The following facts are undisputed. The plaintiff was awarded a Jabatan Kerja Raya (JKR) contract to construct a hospital in Johor Baru. They, in turn, *vide* letter dated 5 May 1999 (exh. IY 3 encl. 2), awarded a component of the said contract, in respect of the computerisation system costing RM67.5 million, to the defendant.

Although the parties agreed that they would execute a formal sub-contract and consultancy agreement, they never got around to it. All they had was a draft agreement (the agreement) (exh. IY 4 encl. 2).

To date, the plaintiff has paid the defendant:

(i) RM1,598,200 in respect of interim claim no: 1 for works done till 30 April 2000; and

(ii) RM1,920,400 as part payment of interim claim no: 2 for works done till 31 July 2000.

A balance of RM1,114,100 is still outstanding under the second claim.

The Dispute

JKR terminated this particular component of the contract on 12 October 2000 and requested the plaintiff, as the main contractor, to submit documentary proof of all actual works done. This was to enable JKR to verify the plaintiff's claim and to make final adjustments before paying off the plaintiff.

According to the plaintiff, despite this instruction being passed on to the defendant, the defendant failed to comply with the same. Instead, the defendant sent two notices demanding payment of RM6,655,885.27 and RM10,956,856.29 respectively, allegedly for works done (exh. IY 19 & 20 encl. 2).

As a direct result of the defendant's failure, the plaintiff was unable to submit the justification of its own claim for payment to JKR. In fact, a subsequent inspection that was carried out revealed that not all the works claimed for by the defendant were properly completed.

The culmination of this dispute was the issuance of a s. 218 notice (the 218 notice) (exh. IY 26 encl. 2) under the Companies Act 1965 by the defendant for a debt totalling RM5,465,442.46 as at 30 April 2002.

The defendant maintained that this amount was derived from 11 invoices issued for the period from March till October 2000 (exh. MF 1 encl. 7). This, the defendant alleged, represented a *bona fide* debt that could not be substantially disputed by the plaintiff.

The Issues

It is trite law that in an application for an interim injunction pending the trial of an action, the court is not called upon to resolve *bona fide* conflict of evidence or decide upon difficult questions of law based entirely on affidavit evidence without the benefit of detailed arguments and mature considerations. (See *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1984] 1 CLJ 13; [1984] 1 CLJ (Rep) 346.)

As a winding-up order against a limited company would normally inflict upon it irreparable damage, besides the consideration of balance of convenience, what the court is required to do at this stage is to decide, based on the affidavit evidence available, whether there are any serious issues to be tried; and whether the defendant, in its intended winding-up petition had sought, in effect, to convert a statutory court into common-law trial court. (See *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah* [1995] 1 CLJ 293 (CA).)

A careful perusal of the affidavits filed by both parties was required in deciding whether the defendant's claim as set out in the 218 notice constituted a debt that could not be substantially disputed by the plaintiff.

Clause 9 Part II of the sub-contract (exh. IY 4 encl. 2) provided as follows:

> … The sub-contractor shall submit to the contractor **an invoice for the value of work properly executed** in accordance with the Payment Schedule upon completing each relevant portion of the sub-contract works. (emphasis added)

Although the amount claimed in an invoice was payable in accordance with the payment schedule agreed upon, it was only the amount for the 'value of the work properly executed' that was payable. The defendant has to date, despite repeated requests from the plaintiff, failed to show the 'value of the work properly executed'.

Clause 19(2) of the said sub-contract provided as follows:

> The contractor (plaintiff) is entitled to deduct from or set off against any money due from him to the sub-contractor (defendant) any sums which the sub-contractor shall be liable to pay the contractor …

This means that the defendant's claim was always subject to the plaintiff's contractual right of set off. Aside from this, the plaintiff has a right of abatement by reason not only of the defendant's failure to account for the amount claimed but also their failure to show that the amount claimed reflected the value of work properly executed. (See *Acsim (Southern) v. Danish Contracting* 47 BLR 55.)

Until this is ascertained conclusively, the amount claimed by the defendant cannot constitute a debt which is due and payable by the plaintiff to the defendant.

The defendant was seeking to rely on the plaintiff's admission *vide* an undated letter that RM4,097,529.89 was outstanding as at 30 September 2000 (exh. MF 3 encl. 7). The letter, which was expressly for audit purposes, contained the estimated amounts payable according to the Payment Schedule agreed upon. This figure was in no way final and was subject to verification as the plaintiff had not waived their contractual right to require the defendant to furnish proof of the claim.

The defendant was also seeking to rely on the quantity surveyor's assessment of actual value of work done for a claim of RM10,725,500 under the consultancy agreement (exh. MF 11 & 12 encl. 7). However, contrary to the allegation made by the defendant, the quantity surveyor had averred that the amount so computed was based on executive summaries provided by the defendant, without any independent actual site evaluation. The figures contained therein were estimated values, prepared for the plaintiff's interim submission to JKR.

Clause 48.10 of the main contract, (which was incorporated into the sub-contract by virtue of cl. 3(1)), laid to rest the defendant's argument with respect to the principle of estoppel against the plaintiff. The fact that the plaintiff made part payment of the defendant's invoices was not in itself conclusive proof that the works to which the payment relate had been completed properly in accordance with the agreement between the parties.

I found that the underlying tenor and substance of the defendant's claim was an allegation of breach of contract, which merely gave rise to a right of action. By resorting to issuing the 218 notice, the defendant seem to be using the court process to pressure the plaintiff, a solvent, viable on-going concern, into paying a disputed amount. The circumstances support the plaintiff's allegation that the defendant was acting *mala fide* because despite having a provision in the sub-contract for referring any dispute to arbitration, the defendant chose to resort to the threat of winding-up as a means of seeking payment from the plaintiff. (See *RHB Bank Bhd v. Gunasingan Ramasingam* [2002] 5 CLJ 544 (HC).)

Given the scenario set out above, the balance of convenience clearly dictated that an interim injunction should be granted by the court to prevent the defendant from presenting a winding-up petition against the plaintiff, who was on the threshold of a lucrative take-over exercise, as the adverse effects and consequences thereof on the latter would likely be permanent, irreparable and irreversible.

Conclusion

The facts set out above raise serious issues that call into substantial dispute the defendant's claim against the plaintiff, and for this reason, I allowed the plaintiff's *inter partes* application for an interim injunction to restrain the defendant carrying out its threat of winding up the plaintiff until the disposal of this civil suit.